1860 (1)

Supreme Court, U.S.
FILED

No. 10-1282 APR 15 2011

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WAHIDULLAH HOSSAINI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

B. ALAN SEIDLER
Attorney for Petitioner
580 Broadway
New York, NY 10012
212-334-3131
seidlerlaw@gmail.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Was petitioner's Fourth Amendment right to be secure against unreasonable searches and seizures violated by the government?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Relevant Constitutional and Statutory Provisions	1
Statement of the Case	2
Reason for Granting the Petition	6
Conclusion	13

APPENDIX

Summary Order of the United States Court of Appeals	App. 1
District Court Opinion	App. 9

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 11

Michigan v. Clifford, 464 U.S. 287 (1984) 10

United States v. Blocker, 104 F.3d 720 (5th Cir. 1997) 12

United States v. Caldwell, 820 F.2d 1395 (5th Cir. 1998) 12

United States v. Gel Spice Company, Inc., 773 F.2d 427 (2d Cir. 1985) 11

United States v. Johnson, 994 F.2d 740 (10th Cir. 1993) 11

United States v. Kordell, 397 U.S. 1 (1970) 11

United States v. Powell, 835 F.2d 1095 (5th Cir. 1998) 12

United States v. Tweel, 550 F.2d 297 (5th Cir. 1977) 12

FEDERAL STATUTES

21 U.S.C. §§ 841(a)(1), 841(b)(1), 846 2

28 U.S.C. § 1254(1) 1

OPINION BELOW

The unpublished Summary Order of the United States Court of Appeals for the Second Circuit, dated January 28, 2011, is submitted herewith as Appendix "A."

JURISDICTION

This matter is on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Judgment of that Court was entered January 28, 2011.

The statutory provision conferring upon this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Petitioner was denied Due Process of Law pursuant to the dictates of the Fourth Amendment to the United States Constitution which states in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath

> or affirmation, and particularly describing the place to be searched, and the persons to be seized.

STATEMENT OF THE CASE

Petitioner initially appealed from a Judgment entered in the United States District Court for the Eastern District of New York (Hon. Raymond J. Dearie), on or about November 17, 2009, finding him guilty of Conspiracy to distribute and possess with the intent to distribute oxycodone and hydrocodone [Count One, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 841(b)(1)(D), 846]; distribution and possession with the intent to distribute oxycodone and hydrocodone [Count Two, 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 841(b)(1)(D)], and his concurrent sentence on each Count of 84 months incarceration, a Supervised Release Term of 3 years, and a total Special Assessment of $200.

In addition to seized items by the government from Family Chemists the trial evidence consisted of the following:

The investigation of petitioner's pharmacy, Family Chemists, Inc., 224-23 Union Turnpike, Queens, New York, began in July, 2005, when a representative of Qualitest Pharmaceuticals contacted the DEA in Birmingham, Alabama to report that Family Chemists was ordering a large amount of hydrocodone. For the period March – May 27, 2005,

Family Chemists ordered 1,238,500 pills of hydrocodone from Qualitest.

In 2005, Family Chemists ordered 1,356,400 units of hydrocodone. According to the DEA analysis, in the year 2005, in zip code 11364 [Family Chemist's zip code] Family Chemists purchased 89% of the hydrocodone purchased in the zip code. The DEA made no effort to record the amount of pills returned to the manufacturer by Family Chemists.

Several years prior to the DEA investigation, prescriptions of Dr. Andrew Black were stolen. Prescriptions of oxycontin written for "Shenel Jackson" and "Marvin Grant" on Dr. Black's prescription pad, and filled at Family Chemists were unauthorized.

Oxycontin prescriptions written on the stolen prescription pad of Dr. Roberta Donin, and filled at Family Chemists were unauthorized.

In 2005, prescription pads for Dr. Jerald Harper were stolen. Prescriptions that were written for 8 persons, and filled at Family Chemists, were unauthorized. On two occasions, Dr. Harper recalled receiving a confirmatory telephone call from a female pharmacist, and Dr. Harper then stated the prescriptions were not written by him.

Dr. Robert Pae testified he would prescribe 40 pills of a hydrocodone mix at a time for a patient. In 2004, a former patient altered prescriptions, and as a consequence Pae received multiple confirming phone calls from pharmacists.

Pharmacist Carmen Catizone was presently employed by a private organization, the National Association of Boards of Pharmacy. This NABP is not an accredited organization by any State. Mr. Catizone traveled a great deal, and testified for a fee in many jurisdictions on pharmacy practices. According to Catizone in New York State a pharmacist can dispense a 30 day supply of oxycontin, but may fill up to a 90 day supply if the physician and pharmacist approve. Again, according to Catizone if the pharmacist suspects a fraudulent prescription, the pharmacist has a responsibility to investigate, and not to dispense the prescription, and notify the authorities if the fraud is confirmed.

Richard Giacolone testified under a grant of immunity, and a non-prosecution agreement from the prosecution. Giacolone had a variety of addictions to opiates, and medications, and was ingesting 60-90 pills per day. Giacolone took some of his fake prescriptions to Family Chemists to be filled. Giacolone had a strictly business relationship with petitioner, until at one point petitioner told Giacolone not to return to the pharmacy. Giacolone's cousin had called petitioner to report that Giacolone had stolen a prescription pad from Minuteman Press. Giacolone could not remember details of his pharmacological relationship with petitioner because years of drug abuse left his mind "fuzzy."

Jennifer Zaltsman had been addicted to a variety of medications, including heroin, and Vicodin. She filled approximately 20 fake prescriptions at Family

Chemists over a one year period. She filled prescriptions under the name of Heather Parisi, and her boyfriend filled prescriptions under the name of Michael Parisi. Zaltsman had no information that petitioner believed the prescriptions to be false. Zaltsman also used different handwriting styles on the prescription pads from different doctors to be filled at Family Chemists.

Dr. Triantafillou testified that he had been notified a few years ago by several pharmacists that fake prescriptions had been written on his prescription pad. Seventeen false Triantafillou prescriptions were filled at Family Chemists, and the Doctor "did not believe" he ever received a call from Family Chemists, or petitioner regarding said prescriptions.

Dr. Robert Duarte prescribed oxycodone and oxycontin for patients in amounts ranging from 10 milligrams to 80 milligrams. A Duarte prescription for patient Pearl Handler was altered from 10 to 80 milligrams of oxycontin, and then filled at Family Chemists.

Dr. Michael Glasser had written prescriptions for oxycontin. In 2004, his prescription pad was stolen, and prescriptions were then falsely written for 80 milligrams of oxycontin from January 4, 2005 – March 15, 2005. Dr. Glasser recalled not personally receiving confirming phone calls from pharmacists for these prescriptions, although it was possible that another doctor in his medical group received confirming pharmacist's calls.

On February 28, 2007, the DEA sent an undercover criminal agent into Family Chemists to have a fake prescription for oxycontin filled. Petitioner refused to fill the fake prescription.

REASON FOR GRANTING THE PETITION

REASON: The investigation of Family Chemists was falsely labeled administrative as a pretext to obtain evidence without a warrant. Further, the agents materially misrepresented the criminal nature of their investigation to petitioner.

Prior to trial, petitioner moved to suppress the following items seized by the Government on given days from Family Chemists, and which evidence was subsequently used by the Government at petitioner's trial:

On January 11, 30-50 prescriptions written in 2004 related to Drs. Iandoli, Fleckner and Tacks, as well as petitioner's statement that Giacalone often paid in change, and rarely filled a complete prescription;

October 4, doctor and patient profiles;

March 3, 2007, petitioner's dispensing reports.

On September 23, 2008, the District Court upheld the lawfulness of the seizures, and ruled the Government did not act in bad faith conducting the searches.

The underlying facts are contrary. In June and again in July, 2005, Diversion Investigator Jaramillo visited Family Chemists to conduct an inspection. While Jaramillo was classified as a Diversion Investigator, she was assigned to a law enforcement group made up of Diversion Investigators, and DEA Special Agents, known as the Tactical Diversion Squad. Agent Jaramillo testified, and clearly admitted her purpose in visiting Family Chemists was to gather evidence to prosecute petitioner criminally.

"Q. Is it fair to say, Investigator Jaramillo, that when you made visits to the Family Chemists Pharmacy to meet with Mr. Hossaini your intentions were not to conduct regulatory, routine audits?

A. My intentions were to gather information on the registered location which is Family Chemists, Inc.

Q. And the purpose of gathering that information in your own words was to build a prosecutable case regarding narcotics conspiracy, isn't that right?

A. Yes, sir.

Q. The answer was yes, sir?

A. Yes, sir."

On August 5, 2005, Jaramillo and DEA agent Argento again visited Family Chemists. Petitioner was questioned about his business practices in filling prescriptions, and asked to provide his Schedule II prescriptions. Petitioner also answered DEA questions, and stated he attempted to verify Dr. Iandoli's

prescriptions, and if petitioner did not know a patient, he would call the physician to verify the prescription.

In early December 2005, Diversion Investigators Jaramillo, Jordan and Loftus went to Family Chemists, showed petitioner Form 82, advised petitioner he had a right to insist on an administrative warrant. Petitioner then executed Form 82. Petitioner was questioned about his prescription practices, and gave information concerning being advised by witness Giacalone's cousin that Giacalone was filling fake prescriptions purportedly written by Dr. Iandoli. At the investigators' request, petitioner produced 37 Dr. Iandoli prescriptions which the investigators copied.

On January 11, 2006, Diversion Investigators returned to Family Chemists, and copied 50 prescriptions. The Investigators then took a statement from petitioner concerning Giacalone's prescription methodology.

On October 4, 2006, Diversion Investigators and New York Police Department Detective Mark Mkwanzi [assigned to the DEA Task Force] served petitioner with an Administrative subpoena for documents related to Dr. Iandoli and others. Petitioner was also asked to view a photo array containing Giacalone's picture, and petitioner selected the photo of Giacalone. Investigators also seized 26-30 prescriptions.

On October 13, 2006, Investigators retrieved documents from Family Chemists in response to the

Administrative subpoena, and questioned petitioner about his 13 top physician prescribers.

On February 6, 2007, Investigator Jaramillo's DEA team arranged for an undercover officer to induce petitioner to illegally dispense a controlled substance at Family Chemists. Petitioner refused to do so.

On February 28, 2007, Investigator Jaramillo, DEA agent Manko and 6 additional, armed DEA agents entered Family Chemists to audit controlled substances. Manko knew petitioner was the target of a criminal investigation, including allegations that petitioner was involved in money laundering in part based on petitioner's Afghani birth. Manko provided petitioner with another DEA Form 82; a subpoena for documents, and a questionnaire to complete. Agents then seized oxycodin and hydrocodone pills, and related prescriptions.

On March 3, 2007, DEA agents returned to Family Chemists to obtain dispensing reports.

On March 15, 2007, DEA agents Manko and Quigley went to Family Chemists to seize records. The pharmacy was closed, and the agents then questioned petitioner at his home.

The aforesaid seizures, and petitioner's statements were used against petitioner at his trial. The agents always told petitioner that the investigation was administrative and not criminal. No administrative proceedings were ever brought against petitioner.

Granted, administrative searches of a pharmacy may be an exception to the Fourth Amendment's warrant requirement. However, here the only purpose of the Government's investigation was to obtain evidence of criminal activity. Any Government attempt in Court to label this investigation administrative was a pretext to avoid the Fourth Amendment requirement for a warrant.

The Court of Appeals for the Second Circuit Summary Order states in error:

> "The evidence supports the conclusion that the administrative investigation was legitimately begun in response to a report from a pharmaceutical company about Hossaini's unusual ordering of oxycodone and hydrocodone; there is no evidence of bad faith."

In fact a criminal investigation began as the result of the pharmaceutical company complaint. The criminal investigation began in July 2005, and there was never anything apart from that investigation that could be classified as administrative. Government witness Jaramillo was candid in her aforesaid testimony.

A criminal warrant is required when the primary object of a search is to gather evidence of criminal activity. *Michigan v. Clifford*, 464 U.S. 287, 296 (1984) ["If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be

found in the place to be searched]. If evidence of criminal activity is discovered during the course of a valid administrative search, it can be seized under the plain view doctrine. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-466 (1971) [This evidence then may be used to establish probable cause to obtain a criminal search warrant. Fire officials may not however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer]. See also, *United States v. Johnson*, 994 F.2d 740, 742 (10th Cir. 1993) [administrative inspection is a "sham" where it is a "pretext solely to gather evidence of criminal activity"].

It cannot be claimed petitioner's consent to the search was consensual. Petitioner's consent to search was procured because the agents misstated the criminal, not administrative purpose of the searches. Searches conducted in bad faith violate the Fourth Amendment. *United States v. Gel Spice Company, Inc.*, 773 F.2d 427, 432-434 (2d Cir. 1985).

While the practice of conducting parallel civil and criminal proceedings is permissible, the government's ability to do so is not unrestrained. In *United States v. Kordell*, 397 U.S. 1, 11-12 (1970) this Court held that under some circumstances the government's use of parallel civil and criminal investigations may be improper. This Court there specifically stated that it did "not deal . . . with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the

defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel . . . ; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." *Id.* at 11-12, 397 U.S. 1. The Supreme Court has never re-visited this issue, but this petitioner urges the Supreme Court to do so now under the fact pattern of petitioner's case.

Additionally, it is settled that a government official may not make "material misrepresentations" concerning the nature of the subject investigation or inquiry. *United States v. Caldwell*, 820 F.2d 1395, 1399 (5th Cir. 1998); *United States v. Blocker*, 104 F.3d 720, 729 (5th Cir. 1997); *United States v. Powell*, 835 F.2d 1095, 1099 (5th Cir. 1998). Instant petitioner was repeatedly and falsely told by the agents visiting Family Chemists that the investigation was administrative and not criminal. That is why petitioner did not retain counsel to advise him during the course of this pre-indictment investigation. This is not a case where the agents merely failed to warn petitioner that the investigation may result in criminal charges. Here, the agents actively took part in deceit and trickery by repeatedly telling petitioner that it was an administrative, but not criminal investigation. See, *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977) [deliberate deception by an agent of the criminal nature of the investigation warrants suppression].

A writ of certiorari should be granted herein. The Government did not seek a search warrant only because it falsely labeled a criminal investigation administrative. The Government affirmatively misled petitioner as to the criminal nature of its investigation.

Petitioner's Fourth Amendment rights were violated.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

DATED: April 14, 2011.

Submitted by,

B. ALAN SEIDLER, ESQ.
Attorney for Petitioner
580 Broadway
New York, New York 10012
212-334-3131

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, at 500 Pearl Street, in the City of New York, on the 28th day of January, two thousand eleven.

Present: RALPH K. WINTER,
ROBERT A. KATZMANN,
DEBRA ANN LIVINGSTON,
Circuit Judges,

UNITED STATES OF AMERICA,

Appellee,

- v -

WAHIDULLAH HOSSAINI,

Defendant-Appellant.

No. 09-5014-cr

(Filed Jan. 28, 2011)

For Defendant-Appellant:

B. ALAN SEIDLER, ESQ., New York, N.Y.

For Appellee:

JACQUELYN M. RASULO (Jo Ann M. Navickas, *of counsel*), Assistant United States Attorney, *for* Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Dearie, *C.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Wahidullah Hossaini appeals from a November 19, 2009 judgment of the United States District Court for the Eastern District of New York (Dearie, *C.J.*), following a jury verdict convicting him of (1) conspiring to distribute and possess with intent to distribute oxycodone and hydrocodone, in violation of 21 U.S.C. §§ 846, 841(a), 841(b)(1)(C), and 841(b)(1)(D); and (2) distribution and possession with intent to distribute oxycodone and hydrocodone, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 841(b)(1)(D). We assume the parties' familiarity with the underlying facts, procedural history of this case, and the specification of issues on appeal.

Hossaini first contends that there was insufficient evidence to sustain his conviction. Specifically, he argues that there was "no evidence" that he

"knowingly filled fake prescriptions," nor that he "solicited the criminal prescriptions, or that he was paid additionally for filling [them]." Def. Br. at 18. "To be guilty of conspiracy, 'there must be some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it.'" *United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004) (quoting *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984)). Because Hossaini failed to object on this ground below, his sufficiency challenge is reviewed for plain error. *See, e.g.*, *United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997) ("To preserve the sufficiency issue and avoid the burden of showing plain error, a defendant must have moved for judgment of acquittal either at the close of all the evidence pursuant to Rule 29(a) *or* post-trial in a motion pursuant to Rule 29(c)."). "For plain error, we must find (1) error, (2) that is plain, and (3) that affects substantial rights; if these three conditions are met, we have discretion to notice the forfeited error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Dorvee*, 616 F.3d 174, 180 n.2 (2d Cir. 2010). Even had this claim been preserved, Hossaini would "bear[ ] a heavy burden because a reviewing court must consider the evidence 'in the light most favorable to the prosecution' and uphold the conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v.*

Aguilar, 585 F.3d 652, 656 (2d Cir. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

We find that there was more than sufficient evidence from which the jury could reasonably conclude that Hossaini knowingly conspired to and did in fact distribute narcotics. For example, the evidence at trial included: (1) Hossaini's handwritten notations – verified by the government's handwriting expert – on fraudulent prescriptions that he had verified the prescriptions, and testimony from the doctors who purportedly wrote the fraudulent prescriptions that Hossaini had not contacted them; (2) evidence that Hossaini had continued to fill prescriptions purportedly written by Dr. Iandoli after the DEA had flagged the suspicious nature of those prescriptions to Hossaini; and (3) testimony from one of the addicts for whom Hossaini had filled fraudulent prescriptions that Hossaini had warned him when law enforcement agents were in the vicinity of the pharmacy. Accordingly, Hossaini's sufficiency challenge is unavailing.

Hossaini next argues that he received ineffective assistance of counsel at trial. "To prove such ineffective assistance, a defendant must show: (1) 'that counsel's representation fell below an objective standard of reasonableness'; and (2) 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *United States v. Brown*, 623 F.3d 104, 112 (2d Cir. 2010) (quoting *Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984))).

When an ineffective assistance claim is raised on direct appeal, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent 28 U.S.C. § 2255 petition; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *Id.* at 112-13 (quoting *United States v. Hasan*, 586 F.3d 161, 170 (2d Cir. 2009)). "[I]n most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance." *Massaro v. United States*, 538 U.S. 500, 504 (2003). In the instant case, we conclude that the factual record before us is insufficiently developed to allow us to resolve Hossaini's ineffective assistance claim, and we accordingly decline to hear it on direct review. We conclude that "a collateral proceeding under section 2255 provides the defendant with an ample remedy for any ineffectiveness claim," while also promoting "judicial economy . . . by requiring the district court to await the defendant's collateral section 2255 motion before addressing his ineffectiveness claim." *United States v. Doe*, 365 F.3d 150, 154 (2d Cir. 2004).

Hossaini also challenges the substantive reasonableness of his sentence. Our review of his sentence for reasonableness "amounts to review for abuse of discretion." *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc) (citing *Gall v. United States*, 552 U.S. 38, 46 (2007)). Substantive determinations shall be set aside "only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* at 189

(quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). "[W]e do not presume that a Guidelines-range sentence is reasonable," but rather "take into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts." *Id.* at 190. "Generally, '[i]f the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor.'" *United States v. Pope*, 554 F.3d 240, 246-47 (2d Cir. 2009) (alteration in original) (quoting *United States v. Fernandez*, 443 F.3d 19, 34 (2d Cir. 2006)). Hossaini argues that his below-Guidelines sentence of 84 months' imprisonment is too harsh for a first-time offender with his background. However, the district court was conscious of the facts about Hossaini's background and the mitigating factors to which he now points, and the judge went to great lengths, including consulting with two colleagues, in order to craft a reasonable sentence. We conclude that the district court gave great consideration to this exercise of its discretion, and the resulting sentence is not unreasonable.

Finally, Hossaini challenges the denial of his two motions to suppress evidence – including prescriptions for oxycodone and hydrocodone, patient and doctor controlled substance dispensing histories, and inventory reports – taken during various administrative

visits to his pharmacy. "When considering a challenge to the resolution of a suppression motion, we review findings of fact for clear error and legal questions *de novo*." *United States v. Stewart*, 551 F.3d 187, 190-91 (2d Cir. 2009). We view the facts in the light most favorable to the government. *United States v. Casado*, 303 F.3d 440, 443 (2d Cir. 2002). Hossaini argues that the DEA conducted two administrative visits in June and July 2005 without presenting the statutorily required Notice of Inspection form to obtain his consent, and that by September 2005, the administrative inspection was being conducted in bad faith to obtain evidence for a parallel criminal investigation. The only evidence supporting Hossaini's contention that two unauthorized inspections occurred prior to the documented administrative inspection in August 2005 is his sister's testimony at the suppression hearing, which was contrary to the evidence and testimony presented by the government at that hearing. The district court's weighing of the witnesses' credibility and its implicit conclusion in denying suppression that no such unauthorized inspections occurred is the sort of finding that is deferentially reviewed, and the district court's conclusion – crediting the testimony of the government witnesses – is not clearly erroneous. With respect to the alleged bad faith stemming from the concurrent investigations, it is entirely permissible for the government to conduct administrative searches for dual administrative and criminal purposes; to find otherwise would require the government to choose between its means of protecting the public and would undermine the regulatory scheme

that authorizes administrative investigations. *See United States v. Gel Spice Co.*, 773 F.2d 427, 432 (2d Cir. 1985). The evidence supports the conclusion that the administrative investigation was legitimately begun in response to a report from a pharmaceutical company about Hossaini's unusual ordering of oxycodone and hydrocodone; there is no evidence of bad faith. Accordingly, the denial of the suppression motions was proper.

We have considered all of Hossaini's remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

/s/ Catherine O'Hagan Wolfe
[SEAL]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	07-CR-816
	:	U.S. Courthouse
-against-	:	Brooklyn, New York
WAHIDULLAH HOSSAINI	:	September 23, 2008
Defendant	:	11:00 a.m.

BEFORE:

HONORABLE RAYMOND J. DEARIE
United States District Judge

APPEARANCES:

For the Government:

BENTON J. CAMPBELL, ESQUIRE
United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201
BY: KATHLEEN M. NAUGHTON
JACQUELYN M. RASULO
Assistant U.S. Attorney

For the Defendant:

BACHNER & HERSKOVITS, P.C.
26 Broadway
Suite 2310
New York, New York 10004
BY: MICHAEL F. BACHNER

Court Reporter:

RONALD E. TOLKIN, RMR
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
718-613-2647

[2] THE CLERK: We are on this morning for a ruling on the motion, U.S.A. versus Hossaini, docket number 07-CR-816.

Mr. Bachner, I will ask you to come up to the podium. I will ask the attorneys please to note their appearance on the record. I will ask Ms. Rasulo and Ms. Naughton to note their appearances.

THE COURT: We have convened today for a ruling on the defense motion to suppress. Since I saw you last I have been the beneficiary of two submissions, Mr. Bachner's memorandum of law, the post hearing memorandum of law dated September 3rd, and the government's letter of the same date in opposition to the motion. I have reviewed the testimony and the cases that have been featured in the argument and research.

I am going to deny the motion, frankly, with little difficulty. I now had a chance to thoroughly review it. I credit the testimony of the government's witnesses, largely uncontroverted testimony of the government's witnesses. There was some conflict between testimony of one or two of the government's witnesses and the defendant's sister, which I acknowledge. Some of which had to do with when various forms

were presented and later on, late in the investigation, at or about the time shortly after the time that the business was closed.

They do not effect my assessment of the credibility [3] of the government's witnesses. I believe that the defendant, his affect, his manner and strategy, if you will was entirely cooperative as one might expect under that environment. This is an unusual environment, as we discussed, where the government is given great administrative authority by virtue of the activity that it regulates and at the same time there is, of course, the specter of a possible parallel criminal investigation.

The issue of bad faith has been raised. I see nothing in this record to suggest that the government acted in bad faith. Perhaps on one or two occasions, I believe, they might have been more cautious by representing the consent form during the so called follow-up visits, which were clearly follow-up visits. I don't believe that the law required it under those circumstances.

As I said, the entire manner of affect of the defendant was to cooperate in a friendly way with the inspectors and agents. It was an attitude one might expect given the government's extensive authority to audit and regulate.

The fact that there was at some point the possibility of a criminal investigation does not, in my view, alter the analysis. Indeed, in this case, it might be said that at the very initial part when the third-party

report comes in from a supplier that there is an unusual amount of [4] oxycodone that was purchased by the pharmacy, immediately the reality is that there is at least potentially a criminal case to be made. That doesn't curtail nor should it curtail the administrative authority of the agency to regulate this conduct. That would be quite an irony as is the investigation and audit are called, if you will, as it addresses it as a potential for a criminal case. It goes from a possible criminal case in this case to, I think, a likely criminal case and then at some point it became an inevitably criminal case. That does not affect the analysis, the fourth amendment analysis, particularly given the defendant's forthrightness as an operative and the voluntary consent to the authority of the DEA personnel who were present.

That is, in a very general way, my view of the evidence. That means we have to set the matter down for trial.

How long a trial do your anticipate?

MS. RASULO: I think approximately, to be conservative, two weeks.

THE COURT: Mr. Bachner, what is your ability in the Fall?

MR. BACHNER: Your Honor, I have availability in November or December.

THE COURT: Let's do it in November.

THE CLERK: Okay.

[5] We have a jury return date of November 10th.

THE COURT: November 10th.

I will pick the jury that morning the first thing. It will be with the openings and testimony to follow immediately thereafter.

Are there any outstanding issues that we need to address?

MS. RASULO: I don't think so, Your Honor. No.

THE COURT: Given the possibility that there may be I think we should see each other one more time before the trial.

THE COURT: Ellie, can you set that up?

THE CLERK: Certainly.

THE COURT: For mid to late October?

THE CLERK: Certainly.

We can put that on for the week of October 20th. We can do that on Tuesday the 21st at 11:00.

MR. BACHNER: October 21st?

THE CLERK: October 21st at 11:00 for a pretrial conference.

MS. RASULO: That works for the government.

MR. BACHNER: That is fine.

THE COURT: I can see you at any time on a moments notice. Just call Ms. Mulqueen. Otherwise, we will see you on that date.

[6] Thank you for your submissions.

MS. RASULO: Thank you, Judge.

MR. BACHNER: Thank you very much, Your Honor.

(Matter concluded.)